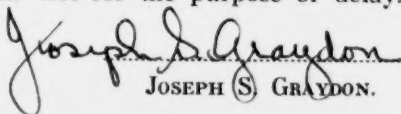


CERTIFICATE OF COUNSEL

Joseph S. Graydon, one of counsel for the appellant, Gulf Refining Company, certifies that this Petition for Rehearing is made in good faith and not for the purpose of delay.


JOSEPH S. GRAYDON.

PETITION FOR REHEARING

The appellant, Gulf Refining Company, petitions this Court for a rehearing for the reason that the decision of this Court as shown by the opinion is founded upon an erroneous assumption of fact, which is not supported or justified by the record.

As will be shown presently by reference to this Court's Opinion, this Court assumed that the general verdict was for damages because of and solely because of the fumes and odors that were emitted from the defendant's refinery, and did not include any damages because of the flood waters which washed away the plaintiff's cottages. If this assumption were justified by the Record, then all else that is said in the Opinion might logically follow, but where the false assumption is concerning a definite fact that can be demonstrated from the Record, then we feel justified in making this positive assertion, and respectfully request the Court to re-examine this question of fact, as it is shown without doubt or uncertainty by the Record, to which we shall presently refer.

To show that this Court's decision is based upon the incorrect assumption that the general verdict was for the "fumes damage" alone, we quote from the printed opinion on page 7 as follows:

"It is obvious that the jury based its verdict on loss of rentals resulting from the fumes, odors, and

noises attendant upon the operation of appellant's refinery for the period between January, 1934, and August, 1938."

Further down on the same page the Opinion states as follows:

"The only way in which this covenant was claimed to have been broken during that period, was by appellant's conduct with reference to the fumes, odors and noise. The only damages claimed for such breach were for losses of rentals during that period. The damages found in the general verdict, based on the answer to the special interrogatory, were for loss of rentals resulting from the smoke, fumes, odor, and noise."

Thus this Court decided that the general verdict was based solely upon the fumes damage apparently because the Court was under the impression, wrong as it was, that the answer to the only one interrogatory, which the jury was able to answer, pertained solely to the fumes damage, and did not include any flood water damage. That interrogatory and the jury's answer was as follows:

"Did the defendant, The Gulf Refining Company, as landlord, give to the plaintiff, quiet and peaceful enjoyment of his premises from January, 1934, to August, 1938, without hindrance or molestation as those terms have been defined to you?

Answer: No."

This interrogatory was framed and submitted for the purpose of having the jury determine whether there had been any breach of the lease, either by reason of fumes damage or by flood damage, because both of these elements of damage had been asserted in the Second Amended Petition as arising because of the breach of the lease, and the right of action was founded entirely *ex contractu* and not *ex delicto*.

We surmise that this Court must have been under the misapprehension that the claim for damages on account of the flood waters was a claim arising *ex delicto*, and that the claim for the fumes damage was the only claim arising out of a breach of the lease. The fact is as shown by the Second Amended Petition, as well as the charge of the trial court, that there were not two separate causes of action but only one cause of action based upon the claim of a breach of the lease, and there were two elements of damages claimed by the plaintiff to have arisen because of the breach of the lease contract: First, the fumes damage causing loss of rentals; and second, the flood water damage causing loss of cottages. And the case was tried upon that theory.

If the case had been founded in the Second Amended Petition upon two separate causes of action, first a claim that the defendant had broken its lease by reason of the fumes which came from the refinery, and second that the defendant had erected levees (not in violation of the covenant of its lease against molestation, but in such a wrongful or negligent manner as to cause a common law tort) then this Court might have been justified in finding that the interrogatory referred only to the breach of the lease against molestation by fumes, and had no reference to the damages arising from the erection of the levees and the resulting flood water damage.

No two such separate and distinct causes of action are, however, joined in the Second Amended Petition, though they might have been under the Ohio Statute permitting the joinder of different causes of action, even though one may sound in contract and the other in tort.

This Court is compelled to take this cause of action as it was actually alleged in the Second Amended Petition and as it was actually submitted to the jury, and in both instances (that is, in the Second Amended Petition and in

the Court's charge) the right of action is founded solely and entirely upon the claim of breach of the lease contract. This distinction is of such vital importance and the determination of the question as to whether the answered interrogatory had reference solely to the fumes damage, as this Court assumed it did, (incorrectly as we think) requires reference to the Record, where it will be found on page 6 and 7, Volume I, that the Second Amended Petition alleges as to the flood water damage as follows:

"Whereas defendant, by the terms of the lease aforesaid, had agreed that the plaintiff would enjoy the premises described in the petition without any let, hindrance, or molestation on defendant's part."

In other words, the plaintiff's claim by the Second Amended Petition, with reference to the construction of levees and the flood water damage, is a claim that the defendant's liability in this respect, arose not because of any tortious breach of a common law duty, but because of the breach of the covenant of the lease providing against molestation.

The basis of flood water liability, as alleged in the Second Amended Petition, arising solely from the breach of the lease, is the theory adopted by the trial court in submitting the case to the jury, and reference to the Court's charge on this point is as follows:

First it appears in the Court's charge on page 1084, Volume II of the Record, in the last part of the first paragraph on that page, where the trial court repeats the wording of the Second Amended Petition just above quoted, to the effect that the flood water damage claim was because the plaintiff claimed that the defendant's conduct in the building of the levee resulted in a molestation of the plaintiff's premises in violation of the terms of the lease. And on page 1089, Vol-

ume II of the Record the trial court charged in the second paragraph: "Plaintiff premises his action upon a certain contract or lease, which has been marked in this case as Exhibit Number 1." * * * "It is this provision of the lease just quoted that plaintiff claims defendant Gulf Refining Company has breached and on account of which breach he claims to have been damaged in the manner and in the amount as set forth in his second amended complaint."

Then on page 1090, Volume II, the Court charged definitely that both claims of damage, that is, for fumes and for flood water, are asserted by the plaintiff as arising because of the breach of the lease, and the jury is so specifically and definitely charged in this respect that we quote the Court's charge on page 1090 as follows:

"Plaintiff charges and claims that his contract of lease has been breached by the defendant Refining Company in two ways: (1) because of odors and noises and fumes given off from and through the operation of its plant at or near Hooven and west of the property on which plaintiff has his lease, and (2) because of the erection of certain levees upon parts of its property and around its tanks which plaintiff claims resulting in throwing and diverting the water upon the property which is covered by his lease, resulting in the washing away of some of his cottages at the time of the flood that occurred in that vicinity and elsewhere in the year 1937."

It will be seen, therefore, that both from the pleadings and the Court's charge, the fumes damage and the water damage was submitted to the jury as arising solely from the breach of the lease.

Consequently, when the jury answered the interrogatory by saying that the Gulf Refining Company had not given

the plaintiff the enjoyment of his premises without hindrance or molestation "*as those terms have been defined to you,*" the jury's answer had no more reference to one source of damage than the other, and nothing whatever justifies this Court in assuming that the jury's answer had reference solely to the fumes damage, because the trial court told the jury that it meant both the fumes damage and the flood damage, and as there was nothing in the interrogatory to separate the two sources of damage there is no more justification for inferring that the interrogatory referred to fumes damage alone than it is to infer that it referred to water damage alone.

The only justified meaning therefore, is that the interrogatory referred to both damages; and if that is so, then the Court's decision is based upon an entirely false assumption of fact.

That the Court did in fact proceed upon this false assumption is found in this Court's Opinion, where, on page 7, the following statement is made:

"The only way in which this covenant was claimed to have been broken during that period, was by appellant's conduct with reference to the fumes, odors and noise. The only damages claimed for such breach were for losses of rentals during that period. The damages found in the general verdict, based on the answer to the special interrogatory, were for loss of rentals resulting from the smoke, fumes, odor, and noise."

That statement shows clearly that this Court did not realize that the flood water damage was also claimed to have arisen by reason of the breach of the covenant of the lease, and without any question the case was submitted to the jury upon the claim that the flood water damage as well

as the fumes damage arose *solely* from a claimed violation of the covenant of the lease providing against molestation. Therefore, when the jury answered the interrogatory, the answer meant both the fumes damage and the flood damage, and the general verdict fixing the amount of damage, of necessity, included both elements of damage, as the general verdict was based upon the answer to this interrogatory, as this Court has said.

The mere fact that the jury's verdict of \$7908.00 was closer to the amount demanded by the plaintiff in his Second Amended Petition, for the loss of rentals because of the fume damage, than it was to the amount of \$12,400 which the plaintiff was demanding for the loss of his cottages from flood water damage, of course, means nothing whatever. So far as the record shows, the amount of the general verdict must have included both damages.

As the general verdict must have contained the amount of damages for both fumes and water as the record stands, we then have a situation where there was a disagreement of the jury, by failing to answer Interrogatories K and L, the former requiring the jury to state the amount of damages by reason of fumes, and the latter by reason of flood.

If the general verdict was for the fumes damage alone (as this Court erroneously assumed) then there could have been no disagreement of the jury in answering interrogatory K, which asked for the fixing of the amount of the fumes damage, because then the answer to interrogatory K would have been the same as the amount of the general verdict.

The failure to answer interrogatory K can mean only one thing: that the jury could not agree upon the amount of the fumes damage. Likewise, the failure to answer interrogatory L meant there was a disagreement of the jury on the amount of the flood water damage.

As the jury has not been able to agree upon the amount of fumes damage or upon the amount of the flood water damage, and since the general verdict contains both elements of damages as the record stands, then the general verdict does not represent an agreement of the jury.

This means that the Gulf Refining Company has a judgment against it when the jury was not able to agree, and it is equivalent to denying to this defendant the right of trial by jury which is guaranteed by the Seventh Amendment of the Constitution of the United States.

And further, we have a disagreement of the jury in failing to answer the other interrogatories, C. H. I and J, which dealt with the fundamental basis for liability of the defendant with reference to the flood water; and without the determination of the facts called for in such interrogatories, the jury could not have fixed any liability for flood water.

There are a number of other pertinent and decisive problems that were presented to this Court in the brief, but which this Court has not attempted to decide, because those questions pertained to the flood water damage, which this Court erroneously considered was out of the case because the answer to Interrogatory G eliminated the flood water damage; and we respectfully urge that a rehearing should be granted to us so that we may demonstrate to the Court that the answer to Interrogatory G did not eliminate the flood water damage, but on the contrary, included that element of damage.

Certainly if this Court can be shown that it proceeded entirely upon a false assumption of fact, the Court would not only be willing to re-examine its decision, but quite anxious to do so. The fact that this Court has announced its decision will surely not create any pride of opinion which would prevent a re-examination of this appeal, especially if

the Court's decision is wrong, and we believe that a rehearing will convince this Court that its decision is wrong.

Respectfully submitted,

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**OPINION OF UNITED STATES CIRCUIT COURT
OF APPEALS**

(Filed August 28, 1942.)

Before ALLEN, HAMILTON and McALLISTER, Circuit Judges.

PER CURIAM. We cannot agree with the contention of appellant, in its petition for rehearing, that there was an inconsistency in the verdict of the jury in its failure to answer certain interrogatories.

Appellee Louis Fetschan can be fairly said to have claimed that the appellant had breached the lease in question in two ways: first, that it caused noxious fumes to be emitted onto appellee's premises; second, that it caused flood waters to be diverted onto such premises. For the damages caused by the fumes, appellee claimed \$8,000.00; for the damages caused by the flood waters, he claimed \$12,400.00. The jury awarded damages of \$7,908.00. It was unable to answer the interrogatories with regard to damages caused by the flood waters.

The fumes damage was claimed as covering the period from January 1934 to August 1938. The jury, in its answer to an interrogatory, found that the lease had been breached "from January 1934 to August 1938." The only damage claimed *for this period* was damage from fumes. The flood damage did not occur until January 1937. In support of the verdict, we are of the opinion that the jury's answer to the interrogatory should be interpreted as a finding that the lease had been breached because of the emission of fumes, during the period commencing January 1934 and continuing until August 1938.

But in order to affirm the judgment, it is not required that even such reasonable inferences be drawn from the jury's finding. If it had found in favor of the appellant on all of the unanswered interrogatories, relating to the flood

damage, its verdict would still be supported by its answer that the lease had been breached during the above-mentioned four-year period. We do not consider other questions raised to be meritorious, and the petition for rehearing is denied.